

**Submission
No 4**

**INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION
OF PRIVACY IN NEW SOUTH WALES**

Organisation: Australian Law Reform Commission

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Australian Government

Australian Law Reform Commission

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President

Committee Chair
The Hon Natasha Maclaren-Jones MLC
NSW Legislative Council Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

12 August 2015

Dear Ms Maclaren-Jones,

Submission to Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to this Inquiry into remedies for the serious invasion of privacy in New South Wales by the Legislative Council's Standing Committee on Law and Justice (the Committee).

As outlined in the media release announcing this Inquiry, the issue of legal remedies for serious invasions of privacy was considered by the NSW Law Reform Commission in its 2009 inquiry into invasions of privacy and the ALRC's 2014 inquiry culminating in the report, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123).

This submission draws heavily on the findings of ALRC Report 123 that are most relevant to the New South Wales Legislative Council's Terms of Reference. These are:

- i) the adequacy of existing remedies for serious invasions of privacy;
- ii) a statutory cause of action for serious invasions of privacy; and
- iii) state and territory harassment and surveillance devices legislation.

In its 2014 inquiry, the ALRC received over 125 submissions from a range of stakeholders and conducted a series of consultations with stakeholders in Sydney, Melbourne and Canberra. Public submissions can all be accessed on the ALRC's website. The ALRC also conducted roundtables with judicial officers and legal practitioners in Sydney and London.

The ALRC drew on nine guiding principles to shape this process of law reform. These principles were:

- privacy is a fundamental value worthy of legal protection;
- there is a public interest in protecting privacy;
- privacy should be balanced with other important interests;
- Australian privacy laws should meet international standards;
- privacy laws should be adaptable to technological change;

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- privacy laws should be clear and certain;
- privacy laws should be coherent and consistent;
- justice to protect privacy should be accessible; and
- privacy protection is an issue of shared responsibility.¹

Context of the Committee’s Inquiry

There are many ways in which a person’s privacy may be invaded. The increasing pervasiveness of instantaneous communications technology, including the use of mobile phone technology, drones and surveillance and tracking devices, has undoubtedly increased the risks of invasions of privacy. These risks may be heightened for some groups—especially children and young people.

There are a number of relevant issues that overlap with privacy protection and that arose in the ALRC’s inquiry. They include, but are not limited to, the criminalisation of ‘sexting’ for minors, the phenomenon of ‘revenge pornography’ and the use of ‘big data’ or surveillance of individuals and specific groups by corporations and governments.

Previous law reform work

The ALRC recognised the importance of building on, and consolidating, previous reports from law reform agencies and parliamentary bodies. In conducting the ALRC inquiry into serious invasions of privacy, previous inquiries by the NSW Law Reform Commission,² the Victorian Law Reform Commission,³ the Commonwealth Department of Prime Minister and Cabinet,⁴ as well as a previous ALRC report,⁵ were invaluable resources. The South Australian Law Reform Institute also published an Issues Paper into whether a statutory cause of action should be adopted in that state.⁶

i) Adequacy of existing remedies for serious invasions of privacy

A cause of action for invasion of privacy does not exist in Australian law. There are a number of existing remedies in tort law, equity, criminal and civil law at a state and territory and Commonwealth level that cover *some* conduct that may amount to a serious invasion of privacy. These include the torts of trespass, nuisance, defamation, passing off and intentional infliction of emotional distress, as well as the equitable action for breach of confidence. Commonwealth and state and territory privacy statutory regimes also provide protection in distinct areas.⁷

The ALRC identified several gaps and inconsistencies in existing legal protections for conduct that may amount to an invasion of privacy. These included, but are not limited, to the following;

- The tort actions of trespass to the person, trespass to land and nuisance do not provide protection from unauthorised and serious intrusions into a person’s private activities in many situations. Trespass to the person requires bodily contact or a threat of such contact. Trespass to land and nuisance protect only the occupier of the land and the former requires an intrusion onto the land.
- In many tortious actions—aside from trespass, malicious prosecution and defamation—there is no remedy for the intentional infliction of emotional distress that does not amount to a psychiatric illness.

1 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) ch 2.

2 NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009).

3 Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010).

4 ‘A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy’ (Issues Paper, Department of the Prime Minister and Cabinet, 2011).

5 Australian Law Reform Commission, *For Your Information Australian Privacy Law and Practice*, Report No 108 (2008). The ALRC has conducted other inquiries into privacy and privacy-related issues, see for example, Australian Law Reform Commission, *Privacy*, Report 22 (1983); Australian Law Reform Commission, *Unfair Publication Defamation and Privacy*, Report 11 (1979).

6 South Australian Law Reform Institute, *Too Much Information A Statutory Cause of Action for Invasion of Privacy*, Issues Paper 4 (2013).

7 For example, the Privacy Commissioner has various powers to handle ‘interferences with privacy’ as defined by s 13 of the *Privacy Act 1988* (Cth).

- In equitable actions for breach of confidence, courts are not empowered to award damages for emotional distress.⁸

The ALRC recommended that in the event a statutory cause of action for serious invasion of privacy is not enacted, that courts should be empowered by legislation to award compensation for emotional distress in cases involving disclosure of private information.⁹

The ALRC's report also included discussion of the prospect of a common law action for invasion of privacy in Australia. A common law tort for invasion of privacy has not yet developed in with the High Court of Australia leaving the question open in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* in 2001.¹⁰

ii) Statutory cause of action for serious invasions of privacy

In contrast to the Committee's Terms of Reference, the ALRC was not asked to determine whether a statutory cause of action is needed or is desirable. Rather, the ALRC's Terms of Reference asked the ALRC to make recommendations regarding the 'detailed legal design of a statutory cause of action'. The ALRC recommended a legal design for a statutory cause of action, described as a tort. The ALRC recommended that this cause of action be located in a Commonwealth Act and that federal, state and territory courts be given jurisdiction to hear claims brought under that Act.¹¹ The elements of this cause of action comprised the following:¹²

- *Two types of invasion*: The invasion of privacy must be either by intrusion into seclusion or misuse of private information.¹³
- *Reasonable expectation of privacy*: The plaintiff must prove that they had a reasonable expectation of privacy in all the circumstances (the ALRC recommended a series of factors that a court may consider when determining whether a person had a reasonable expectation of privacy).¹⁴
- *Fault element*: The invasion must have been committed intentionally or recklessly—mere negligence is not sufficient.¹⁵
- *Seriousness*: The invasion must be serious.¹⁶
- *Proof of damage*: The invasion need not cause actual damage and damages for emotional distress may be awarded.¹⁷
- *Public Interest*: The court must be satisfied that the public interest in privacy outweighs any countervailing public interests.¹⁸

8 Equitable compensation is generally only awarded in Australia to compensate for economic loss. There have been isolated developments in the common law where courts have awarded damages for emotional distress in actions for breach of privacy, however these are limited. For instance, in the West Australian case of *Wilson v Ferguson* [2015] WASC 15, Mitchell J found that the defendant had breached an equitable duty of confidence owed to the plaintiff when he posted sexually explicit photos of her to Facebook without her consent. The plaintiff was awarded damages for the emotional distress she suffered from the release of the photos, as well as damages for economic loss. The court relied on the Victorian case of *Giller v Procopets* (2008) 24 VR 1. See also, *Doe v Australian Broadcasting Corporation* [2007] VCC 281. However, this case was settled before appeal.

9 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) Rec 13–1.

10 A tort of invasion of privacy has been recognised by two lower court decisions: *Grosse v Purvis* [2003] QDC 151 (16 June 2003); *Doe v Australian Broadcasting Corporation* [2007] VCC 281. These cases suggest that the future development of the common law in Australia is uncertain. Any significant development would require a litigant with the resources to initiate proceedings in order to test the common law. Further, given the often embarrassing nature of an invasion of privacy, litigants may be unwilling to pursue claims: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) [3.56].

11 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) recs 4–1 and 4–2.

12 This is provided to the Committee merely as an overview of the recommendations. For a full picture of the context in which the recommendations arose, see the Final Report: Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014).

13 Ibid rec 5–1.

14 Ibid recs 6–1 and 6–2.

15 Ibid rec 7–1. The ALRC also recommended that an apology by the defendant should not constitute an admission of fault or liability: Ibid rec 7–2.

16 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) rec 8–1.

17 Ibid rec 8–2.

18 Ibid rec 9–1. The ALRC also recommended that a list of countervailing public interest factors that a court may consider when determining whether the plaintiff has a public interest in privacy that outweighs countervailing interests: Ibid rec 9–2.

The ALRC also considered important procedural and substantive elements of a statutory cause of action. The ALRC recommended that the cause of action be limited to natural persons;¹⁹ that a cause of action should not survive for the benefit of the estate of the plaintiff or against the estate of the defendant;²⁰ that the limitation period should be set at one year after the plaintiff becomes aware of the invasion, or three years after the invasion—whichever comes first.²¹

The ALRC recommended a range of defences to the tortious action for serious invasion of privacy and a range of remedies. The defences recommended comprised the following:

- a defence that the defendant's conduct was required or authorised by law;²²
- a defence for conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable;²³
- a defence of necessity;²⁴
- a defence of consent;²⁵
- a defence of absolute privilege;²⁶
- a defence of publication of public documents;²⁷
- a defence of fair report of proceedings of public concern;²⁸ and
- an exemption for children and young persons.²⁹

The ALRC recommended the availability of the following remedies, empowering courts to:

- award damages, including damages for emotional distress (the ALRC included an exhaustive list of factors that a court may consider when determining the amount of damages);³⁰
- award a separate sum as aggravated damages;³¹
- award exemplary damages in exceptional circumstances (the ALRC recommended a cap on damages that would apply to the sum of both damages for non-economic loss and exemplary damages, and that this cap should not exceed the cap on damages for non-economic loss in defamation);³²
- award an account of profits;³³
- award injunctive relief at any stage of proceedings to restrain a threatened or apprehended invasion of privacy (the ALRC recommended that when a court is considering the grant of injunctive relief, the court should have particular regard to freedom of expression and other matters of public interest);³⁴
- order the delivery up and destruction or removal of material;³⁵
- order the publication of a correction where false private information has been published;³⁶

19 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) rec 10–2.

20 Ibid rec 10–3.

21 Ibid rec 10–4. There were several other recommendations pertaining to the limitation period, see: Ibid rec 10–5, 10–6 and 10–7.

22 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) rec 11–1.

23 Ibid rec 11–2.

24 Ibid rec 11–3.

25 Ibid rec 11–4.

26 Ibid rec 11–5.

27 Ibid rec 11–6.

28 Ibid rec 11–7.

29 Ibid rec 11–8.

30 Ibid recs 12–1 and 12–2.

31 Ibid rec 12–4.

32 Ibid recs 12–4 and 12–5.

33 Ibid rec 12–6.

34 Ibid rec 12–7 and 12–8.

35 Ibid rec 12–9.

36 Ibid rec 12–10.

- order the defendant to apologise;³⁷ and
- make a declaration in the interests of avoiding costly and lengthy proceedings.³⁸

In making these recommendations, the ALRC considered the following factors:

- the existing legal protections for privacy;
- gaps and deficiencies in that legal protection;
- the likelihood of the common law developing a cause of action for invasions of privacy in the absence of a statute;
- the detailed design of the cause of action—its elements, defences and remedies; and
- whether the cause of action is better designed in statute, or left to be developed by the courts.

iii) State and territory harassment and surveillance devices legislation

The Committee's Inquiry will no doubt be primarily concerned with the operation and adequacy of laws in New South Wales. The ALRC's report considered the value of national consistency in state and territory laws in two key areas: harassment laws and surveillance devices legislation. Both areas of law provide important privacy protection by criminalising conduct amounting to harassment and creating offences for the unauthorised use of listening devices, optical surveillance devices, tracking devices and data surveillance devices. The ALRC made recommendations that the Commonwealth government should adopt uniform surveillance devices and workplace laws to criminalise the unauthorised use of such devices.³⁹ The ALRC also recommended that if a statutory cause of action for serious invasions of privacy is not enacted, state and territory governments should enact uniform legislation creating a tort of harassment.⁴⁰

We hope this submission is of assistance to your Committee. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,

Professor Rosalind Croucher AM

37 Ibid rec 12–11.

38 Ibid rec 12–2.

39 Ibid recs 14–1 to 14–8.

40 Ibid rec 15–1.